No. 82-1050

In The
Supreme Court of the United States
October Term, 1982

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES,
Appellant,

vs.

ROBERT H. MATHEWS, ET AL.,
Appellees.

On Appeal from the United States District Court for the Northern District of Alabama

BRIEF FOR APPELLEES

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QUESTIONS PRESENTED

1. Whether the exception clause of the government pension offset provision which incorporates by reference the gender-based dependency requirement previously held unconstitutional by this Court's decision in *Califano v. Goldfarb:* A) should be interpreted without reference to that requirement, or, if not, B) violates the equal protection component of the due process clause of the fifth amendment.

2. Whether a severability clause which precludes all persons harmed by an unconstitutional statutory classification from securing judicial relief is an unconstitutional obstruction of the exercise of judicial review.

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CONSTITUTIONAL PROVISION INVOLVED

The fifth amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

LEGISLATIVE PROVISIONS INVOLVED

Section 334 of Public Law 95-216 provides for the non-applicability of the 1977 Amendments as follows:

> The amendments . . . shall not apply with respect to any monthly insurance benefit payable, under subsections (b), (c), (e), (f) or (g) (as the case may be) of section 202 of the Social Security Act, to an individual . . . who at the time of application for or initial entitlement to such monthly insurance benefit under such subsections (b), (c), (e), (f), or (g) meets the requirements of that subsection as it was in effect and being administered in January, 1977.

The severability clause of Section 334 of Public Law 95-216 provides in pertinent part:

> If any provision of this subsection, or the application thereof to any person or circumstance, is held invalid, the remainder of this section shall not be affected thereby, but the application of this subsection to any other persons or circumstances shall also be considered invalid.

STATEMENT

1. This appeal involves two aspects of the exception clause of the pension offset provision which was enacted as part of the Social Security Amendments of 1977. The first aspect involves an attempt by Congress to resurrect the gender-based dependency test held unconstitutional in *Califano v. Goldfarb*, 430 U. S. 199 (1977) and make it applicable to applications for spousal benefits in the five-

year period between December, 1977, and December, 1982. The second aspect involves a congressional attempt to shield the resurrected dependency test from legal challenge and judicial review through the use of an inverse severability clause.

2. Appellee Robert Mathews is a 67 year old white male who retired in November, 1977, from his job with the Post Office. He has never been an insured individual under the Social Security Act and has never received old-age, survivor, or disability benefits under the Act. His wife, Mary, worked as an employee of a local bank in Cullman, Alabama, for 35 years. She was a fully insured individual under the Social Security Act at the time of her retirement in June, 1977.

Prior to his retirement, Mr. Mathews inquired of his local Social Security office as to whether or not he would be eligible for spousal benefits. Tr. 42 ("Tr." refers to the transcript of the administrative proceedings in this case). He was advised that, as a result of the Court's decision in *Goldfarb*, he would indeed be entitled to receive benefits under subsection 202(c) of the Social Security Act (42 U. S. C. § 402(c) (1976)), notwithstanding his receipt of a government pension. Based at least in part upon this appraisal of his eligibility for spousal benefits, Mr. Mathews made his retirement decision and did subsequently retire in November, 1977. Tr. 42.

In December of 1977, Mr. Mathews filed an application for husband's insurance benefits based on his wife's earnings records.[1] Although Mr. Mathews filed his appli-

[1]Mr. Mathews filed his application for spousal benefits 30 days before his 62nd birthday—January 13, 1978. 42 U.S.C. § 402(c), both before and after the *Goldfarb* decision, required that the husband be at least age 62 before being eligible for spousal benefits.

cation for spousal benefits at a time during which he did not have a demonstrate dependency, the Social Security Administration advised him on March 23, 1978, that, as a result of the Social Security Amendments of 1977, the fact that Mr. Mathews was not dependent upon his wife would cause his monthly spousal benefit to be offset, dollar for dollar, by the amount of his government pension.[2] Social Security Amendments of 1977 Pub. L. No. 95-216, § 334(f), 91 Stat. 1546 (1977). Had the gender of the Mathewses been reversed, Mrs. Mathews' application as a non-dependent spouse would have been granted, and her spousal benefits would *not* have been subjected to offset by the amount of her government pension.

3. On March 2, 1977, the Court, in *Califano v. Goldfarb*, 430 U. S. 199 (1977), held that the gender-based dependency test found in subsection 202(f) of the Social Security Act (former 42 U. S. C. § 402(f)) was violative of the equal protection component of the fifth amendment. Prior to the *Goldfarb* decision, benefits to spouses of deceased, retired, or disabled workers who were covered under the provisions of the Social Security Act were paid according to a gender-based dependency test. Former 42 U. S. C. § 402(c) (1) (C), (f) (1) (D). Wives automatically received spousal benefits, although their benefits were subject to the dual entitlement rule, which offset the amount of spousal benefits by the amount of any primary benefits earned by the wives in covered employment. Husbands, on the other hand, in order to receive spousal bene-

[2]On the date of his application for spousal benefits, Mr. Mathews was receiving a civil service pension of $573.00 per month ($6,876.00 annually) for thirty-two years of service. The Social Security Administration determined that he would be entitled to receive $153.20 in spousal benefits. Since the amount of his government pension exceeded the amount of his entitlement to spousal benefits, the latter was reduced to zero.

fits, had to satisfy a gender-based dependency test. This dependency test required proof that the male applicant received at least one-half of his support from his wife. If this dependency test were met, his benefits were also subject to the rule on dual entitlement. Thus, the rules governing eligibility for spousal benefits resulted in the work of females (who were covered by the Social Security Act and whose husbands received a government pension) providing less protection for their families in the form of benefits than the work of males (who were covered by the Social Security Act and whose wives received a governmental pension).

Goldfarb eliminated this inequity by invalidating the dependency requirement as a condition of eligibility for widowers' benefits. Shortly thereafter the Court summarily affirmed two district court decisions which had voided the same type of dependency test for husbands' insurance benefits under subsection 202(c) of the Social Security Act (former 42 U. S. C. § 402(c)). *Califano v. Silbowitz*, 430 U. S. 924 (1977); *Califano v. Jablon*, 430 U. S. 924 (1977).[3] Although the effect of these decisions was to judicially eliminate the dependency requirement as a condition of eligibility for spousal benefits, the same dependency requirement surfaced as a qualifying criterion after the Social Security Amendments of 1977.

The Social Security Amendments of 1977 were the result of congressional consideration of the problems of decoupling (correcting the over-indexing problem created in 1972), increases in the payroll tax rate, and other fundamental issues having to do with the financing and benefit

[3]The Court also dismissed the Secretary's appeal in another case involving both subsections (c) and (f). *Coffin v. Secretary of Health, Education & Welfare*, 400 F. Supp. 953 (D.D.C. 1975), *appeal dismissed*, 430 U. S. 924 (1977).

structure of the social security system. Within these amendments are found the pension offset provision and its exception clause. Social Security Amendments of 1977, Pub. L. No. 95-216, § 334, 91 Stat. 1546 (1977). Under the pension offset provision, any claim for spousal benefits by an applicant whose work history is based on employment not covered by the Social Security Act is offset dollar for dollar by the amount of any public pension received by the applicant. The exception clause to this provision provides, in essence, that the offset does not apply to persons who retire or could retire within five years of the effective date of the offset and who would have been eligible for full spousal benefits under the Social Security Act "as it was in effect and being administered in January, 1977"[4] Social Security Amendments of 1977, Pub. L. No. 95-216, § 334(g) (1), 91 Stat. 1547 (1977).

In implementing Public Law 95-216, the Social Security Administration has interpreted the exception clause to mean that the offset will not apply to a particular applicant if:

1. The applicant for spousal benefits is either receiving or eligible to receive a government pension for any month in the period December, 1977 through November, 1982; and,
2. The applicant for spousal benefits would, at the time of filing for spousal benefits, meet all the requirements for entitlement as they were in effect and being administered in January, 1977, including the gender-based dependency test.[5]

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[4]The exception clause remained in effect until November, 1982 — sixty months after it was enacted. Social Security Amendments of 1977, Pub. L. No. 95-216, § 334(g)(1)(A), 91 Stat. 1546 (1977).

[5]Social Security Administration Claims Manual GN 02608: 505A (June, 1982). The following example is given by the So-

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The effect of this interpretation is to, once again, require male applicants for spousal benefits to prove dependency according to the pre-*Goldfarb* mandates of 42 U. S. C. § 402

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cial Security Administration in explaining the application of the exception clause to the pension offset provision:

Example: Mary Smith was married to Sam for 22 years. They were divorced in 1970 and she married Harold. All three have worked in noncovered government employment and are or will be eligible for pensions based on that work. Mary had also worked for over 10 years in private employment covered by social security. Neither Sam nor Harold has ever worked in covered employment but both plan on filing for spouse's benefits based on Mary's earnings record, when they reach age 62.

Mary will first be eligible for her government pension in June, 1978, but does not plan on retiring until June, 1983, when she will attain age 65 and qualify for full (not actuarially reduced) retirement insurance benefits. Her ex-husband, Sam, will retire and be eligible for his government pension in January 1983. He will reach age 62 in January 1983. Mary's present husband, Harold, has retired and has been receiving a government pension since December 1979. He will reach age 62 in January 1983.

Effect of offset provision on each:

Mary: When Mary applies for social security benefits, *she will not be affected by the offset in any way,* since her benefits will be based on her own earnings record and not that of a spouse or former spouse.

Harold: When Harold applies for social security benefits, he will have to apply for husband's benefits based on Mary's earnings, since he has no earnings record of his own. He receives a pension based on his own government work and that work was not covered by social security. And, he files for social security after December 1977. Therefore, he is subject to the offset, unless he meets the two conditions for the exception. He obviously meets the first condition, since he is receiving his pension between 1977 and 1984, but he cannot qualify for social security benefits under the January 1977 rules which included a one-half support dependency test for husband's benefits. *Therefore, the governmental pension offset is applied,* reducing his social security bene-

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(c)—this time in order to avoid the harsh effects of the pension offset provision. Similarly situated female applicants, on the other hand, automatically qualify for the exception clause without proof of dependency. This results in female wage earners being afforded less protection for their spouses than is provided to a similarly situated male wage earner.

Apparently recognizing the problems created by this attempt to reinstate the gender-based dependency test,[6]

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fits one dollar for every dollar he receives in his monthly pension check.

Sam: When Sam applies for social security benefits, he must apply for divorced husband's benefits based on Mary's earnings record, since he has no social security earnings record of his own. Sam will be receiving or eligible to receive a pension based on his own government work and that work will not have been covered by social security on the last day he is employed. And, he files for social security after December, 1977. Therefore, he is subject to the offset, unless he meets the two conditions for the exception.

Sam does not meet either of the conditions for the exception. He was not eligible to receive a government pension until after the period December 1977 through November 1982, and, he cannot qualify for social security benefits under the January 1977 rules. No divorced husbands received benefits until the court decision created them later in 1977. *Therefore, Sam's social security benefits are subject to the governmental pension offset.* Note, however, that Sam does not become eligible for social security dependent's benefits immediately upon his 62nd birthday; he must wait until Mary files for benefits as a retired worker six months later in June 1983.

[6]There were at least seven other lower court decisions involving male applicant challenges to the exception clause which were brought to the attention of Congress during its consideration of modifications to the exception clause. Congressional Research Service, The Government Pension Offset in Social Security 29 (October 1, 1982). *See Rosofsky v. Schweiker*, 523 F. Supp. 1180 (E.D. N.Y. 1981); *Miller v. Department of Health &*

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and facing the November, 1982, expiration of the exception clause, Congress agreed on December 21, 1982, to extend the exception clause and to amend its eligibility requirements. The new provision extends the exception clause until July, 1983, but requires both male and female applicants to demonstrate dependency before being eligible for inclusion within the exception clause. Pub. L. No. 97-455, § 7, 96 Stat. 2501 (1982).[7]

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Human Services, 517 F. Supp. 1192 (E.D. N.Y. 1981); *Webb* v. *Harris*, 509 F. Supp. 1091 (N.D. Cal. 1981); *Caloger* v. *Harris*, 1981 Unempl. Ins. Rep. (CCH) ¶17,754 (D. Md. Mar. 25, 1981); *Wachtell* v. *Schweiker*, No. 80-8022, (S.D. Fla. Jan. 26, 1982) (See Mot. to Aff. App. C); *Hudgins* v. *Sec. of H.E.W.*, 1980 (Unempl. Ins. Rep. (CCH) ¶17,059 (D. Md. April 17, 1980); *Duffy* v. *Harris*, 1979 Unempl. Ins. Rep. (CCH) ¶16,906 (D.N.M. Oct. 23, 1979). *Rosolsky* held that the gender-based exception clause was unconstitutional but that the inverse severability provision required the male applicant to go remediless. The Secretary appealed this holding. Probable jurisdiction was noted, 456 U. S. 959 (1982), and the Secretary subsequently dismissed the appeal. 457 U. S. 1141 (1982). The courts in *Duffy* and *Miller* upheld the exception clause based upon application of the traditional rational basis standard of review. In *Hudgins*, a pro se proceeding, no constitutional issues were raised.

Both the *Webb* and *Wachtell* decisions held that the exception clause should be interpreted without incorporating the gender-based dependency test in former 42 U.S.C. § 402(c) and (f). An appeal was taken by the Government in *Webb*, and on March 7, 1983, the Ninth Circuit affirmed the district court's analysis. *Webb v. Schweiker*, 701 F. 2d 81 (9th Cir. 1983), *petition for cert. filed, sub nom. Heckler v. Webb*, 51 U. S. L. W. 3922 (U. S. June 21, 1983) (No. 82-2094). The Government has also appealed the decision in *Wachtel.. Wachtell v. Schweiker*, No. 80-8022 (S.D. Fla. Jan. 26, 1982), *appeal docketed*, No. 82-5552 (11th Cir. Apr. 30, 1982).

[7]The amendments to the Social Security Act appear in Section 7 of the Virgin Island Tax Bill. The Conference Report offers the following explanation for elimination of the gender-based dependency test:

> The Conferees agreed that in lieu of a modification of the public pension offset clause, the public pension offset

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Since the 1982 changes to the exception clause provided only a temporary solution to the pension offset problem, Congress again addressed the problem in 1983. Congress has solved the dilemma posed by the 1977 and 1982 versions of the exception clause to the pension offset provision through the Social Security Amendments of 1983, which became effective on April 20, 1983. Under the 1983 statute, applicants for spousal benefits who become eligible for a public pension after June, 1983, will have their spousal benefits offset by only two-thirds the amount of their public pensions, but no longer is there an exception clause available to these applicants. Social Security Amendments of 1983, Pub. L. No. 98-21, § 337, 97 Stat. 131 (1983). Further, this statute contains no gender-based distinctions governing the application of the pension offset, nor any reference to earlier statutes within its eligibility criteria.

SUMMARY OF ARGUMENT

I.

The exception clause should be interpreted so as to incorporate no gender-based dependency test. The statutory language which is at issue in the present case is the phrase "as . . . in effect and being administered in January, 1977." The Secretary would have the Court construe this language so as to require male applicants for spousal benefits to demonstrate dependency before they would be

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would not apply to an individual who becomes eligible for a public pension prior to July, 1983 if that individual is dependent upon his or her spouse for one-half support. The one-half support test would be applied according to the pre-1977 law, except that it would apply to both men and women.

H.R. Conf. Rep. No. 97-985, 97th Cong., 2d Sess. 13 (1982).

eligible for inclusion within the exceptions clause and thus be exempt from the pension offset provision. This construction obliges the Court to validate a congressional attempt to reinstitute a gender-based dependency test previously held unconstitutional by the Court in *Califano v. Goldfarb*, 430 U. S. 199 (1977). In contrast to the Secretary's construction, appellees offer a construction which requires the Court to reach no constitutional issues.

Examination of the qualifying criteria for spousal benefits as they were "in effect . . . in January, 1977" shows that they contained no requirement for a gender-based proof of dependency. This is so because the *Goldfarb* court invalidated the gender-based dependency test as violative of the equal protection guarantee. Since the gender-based dependency test was unconstitutional, it is "as inoperative as though it had never been passed." *Norton v. Shelby County*, 118 U. S. 425, 442 (1886). It is therefore evident that subsections (c) and (f), which are at issue in the present case, as "in effect . . . in January, 1977" contained no gender-based dependency test. Furthermore, Congress, when it enacted the exception clause, was aware of this Court's decision nine months earlier in *Goldfarb*. Because the exception clause re-enacts subsections (c) and (f) within the qualifying criteria of the exception clause, Congress is presumed to be aware of the judicial interpretation given those subsections and is presumed to have adopted their judicial interpretation. *Albemarle Paper Co. v. Moody*, 422 U. S. 405, 414 n. 8 (1975). Therefore, when Congress re-enacted subsections (c) and (f) it intended to re-enact only those constitutionally valid requirements of subsections (c) and (f) and did not intend to re-enact the unconstitutional gender-based dependency test.

Examination of the qualifying criteria of subsections (c) and (f) as they were "being administered in January, 1977" also shows that they contained no requirement for a gender-based proof of dependency. In January, 1977, the Social Security Administration was administering the exception clause by delaying any decision as to whether or not to grant benefits under subsections (c) and (f) until this Court's decision in *Goldfarb*. Thus, subsections (c) and (f) "as being administered in January, 1977" deferred to this Court's decision in *Goldfarb*. After *Goldfarb* it became clear that subsections (c) and (f) contain no gender-based dependency test.

Because appellees' interpretation of the exception clause is "a fair alternative construction" which avoids any question of constitutional validity, it is the interpretation which must be followed. *Lewis v. United States*, 445 U. S. 55, 65 (1980).

II.

If this Court decides that the qualifying criteria of the exception clause contains a gender-based dependency test, then this exception clause is unconstitutional because it violates the equal protection conponent of the fifth amendment. The exception clause treats men and women differently. It requires proof of dependency by nondependent male government employees and requires no proof of dependency by nondependent female government employees. Thus, similarly situated individuals are treated differently, solely on the basis of sex.

Since the exception clause treats similarly situated persons differently, solely on the basis of sex, the government carries the burden of showing an "'exceedingly persuasive justification' for the classification," which can be met by showing an important governmental objective fur-

thered by substantially related means. *Mississippi University for Women v. Hogan*, — U. S. —, 102 S. Ct. 3331, 3336 (1982) (quoting Kirchberg v. Feenstra, 450 U. S. 455, 461 (1981)). In this case the government has failed to meet this burden.

The exception clause protects only gender-based reliance interests. It protects the reliance interests of all women, while protecting the reliance interests of dependent men only. Since there is no reason to compensate women for past discrimination in the area of reliance interests, then a governmental objective which seeks to protect the reliance interests of women to a greater extent than the reliance interests of men is not an important governmental objective. *Califano v. Webster*, 430 U. S. 314 (1977). Thus, if the governmental objective embodied in the exception clause is the protection of gender-based reliance interests, then the exception clause is unconstitutional because such an objective is not an important governmental objective.

If, however, the important governmental objective embodied in the exception clause is the protection of all reliance interests, rather than gender-based reliance interests, then the exception clause is unconstitutional because the means it employs are not substantially related to that end. Because the reliance interests of women are protected to a greater degree than the reliance interests of men, the exception clause does not employ means which are substantially related to the protection of the "reliance interest of [all] retirees." (Appellant's Brief at 31, argument heading B).

Furthermore, if the exception clause re-incorporates a gender-based dependency test, then the exception clause must be viewed as a congressional attempt to re-enact a

provision previously held unconstitutional by the Court. If the Court recognizes the validity of such a congressional attempt to ressurect the unconstitutional, then the door will be opened to allow the legislature to legislate away the effects of any constitutional adjudication with which it is dissatisfied. Although the protection of reliance interests is a valid legislative objective, such an objective cannot validate a statute, such as the exception clause, which delays not only the effects of a statute, but also the effects of a constitutional adjudication.

III.

The inverse severability clause at issue in the present case is unconstitutional because it attempts to preclude the courts from granting any tangible relief to the only persons harmed by the underinclusiveness of the exception clause. Although the Court has generally sought to ascertain the remedial design of the legislature and has given effect to severability clauses which provide for some form of relief to the parties injured by a violation of constitutional rights, the Court has never upheld a severability clause like the one at issue here (an inverse severability clause) which denies any tangible relief whatever to those injured by a statute's unconstitutionality.

It is well settled that a remedy for the injury inflicted by the violation of a constitutional right is an essential part of the right itself. *Marbury v. Madison*, 5 U. S. (1 Cranch) 137 (1803), *Brown v. Board of Education*, 349 U. S. 294 (1955). It is also firmly established that the remedial power of the federal courts is independent from obstruction by Congress and that the Court will only sustain restrictions upon this power when Congress has provided alternative, constitutionally adequate remedies for violations of constitutional rights. *Cary v. Curtis*, 44 U. S.

(3 How.) 236 (1845), *Lockerty v. Phillips*, 319 U.S. 182 (1943).

This Court has the inherent power and responsibility to provide a remedy to appellees herein. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Although the Secretary argues that appellees can receive a constitutionally adequate remedy by "obtaining a judicial decree that the exception provision violates" the equal protection guarantee (Appellant's Brief at 48), it is clear that such a remedy is not constitutionally adequate. The Court has repeatedly drawn the distinction between correction of an unconstitutional classification and the grant of a remedy for the injury caused by such a classification. *Welsh v. United States*, 398 U.S. 333, 363 (Harlan, J., concurring); *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239, 247 (1931).

The injury inflicted by the underinclusiveness of the exception clause is not the abstract wrong of unequal treatment but the concrete denial of spousal benefits. This is the effect envisioned by the inverse severability clause. Therefore, because the inverse severability clause attempts to deprive the Court of its power to grant a constitutionally adequate remedy to appellees by extension of benefits to their class, it is unconstitutional and cannot be enforced.

The inverse severability clause at issue herein is also unconstitutional because it attempts to deny appellees of their standing to contest the constitutionality of the exception clause. By purporting to nullify the grace period granted by the exception clause in the event it is found unconstitutional, the inverse severability clause would have the effect of insuring that appellees could not "stand to profit in some personal interest" should their challenge

prove successful, thus making the "exercise of judicial power . . . gratuitous." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U. S. 26, 39 (1976). Thus, the inverse severability clause herein is a congressional attempt to destroy appellees' standing by removing from their claim any attributes of a "case or controversy." While the "exceptions" clause of article III grants Congress substantial power to define the subject matter jurisdiction of this Court, Congress cannot constitutionally deprive the Court of all jurisdiction to hear constitutional claims by persons tangibly harmed by a violation of constitutional rights.

Therefore, the inverse severability clause is unconstitutional because it is an improper congressional exercise of the "exceptions" clause. It attempts to remove appellees' claim from the jurisdiction of this Court by reducing it to a nonjusticiable issue.

ARGUMENT

I. The exception clause of the pension offset provision should be interpreted without incorporating by reference the gender-based dependency test held unconstitutional in Goldfarb.

The statutory language at issue in this case is that of the exception clause to the pension offset provision. As in any case involving the interpretation of a statute, the starting point must be the language of the statute itself. *Lewis v. United States*, 445 U. S. 55, 60 (1980). In this instance the relevant language of the exception clause is as follows:

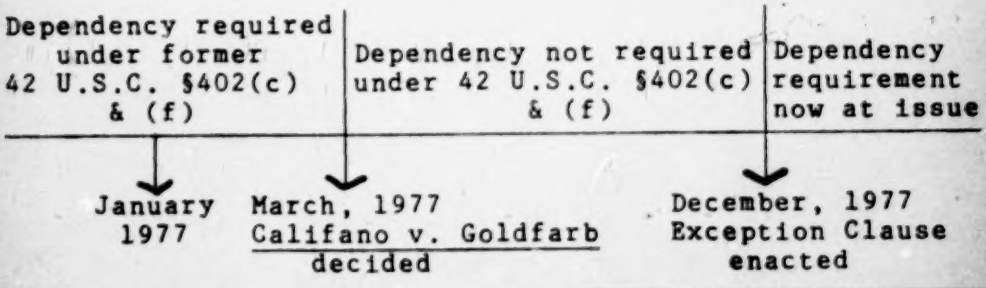
> The [pension offset] . . . shall not apply to an individual . . . who at the time of application for or initial entitlement to such monthly insurance benefit under

such subsection (b), (c), (e), (f), or (g) *meets the requirements of that subsection as it was in effect and being administered in January, 1977.* (Emphasis added.)[8]

The specific point of contention between the Secretary and appellees is the meaning to be given the phrase "in effect and being administered in January, 1977." Resolution of this issue will determine whether or not appellees fit within the provisions of the exception clause and are therefore eligible for spousal benefits without offset.

Simply stated, the Secretary's interpretation of this language would require proof of dependency by male applicants as a precondition to their receipt of spousal benefits. This is so because the Secretary reads the exception clause so as to require male applicants to fulfill all criteria set out in subsections 202(c) and (f) as these sections existed prior to *Goldfarb*. Of course, this interpretation chooses to ignore the fact that when the exception clause makes reference to these subsections it does so only after and in light of *Goldfarb*.

The interrelationship between subsections 202(c) and (f), the *Goldfarb* decision, and the exception clause can easily be seen in the following representation:



[8]The Social Security Amendments of 1977, Pub. L. 95-216, § 334(g) (1) (B), 91 Stat. 1547 (1977).

As the time line demonstrates, the exception clause was enacted after the *Goldfarb* decision had voided the dependency requirement for male applicants for spousal benefits. Given this history, it cannot be assumed that Congress, in referring to subsections (c) and (f), intended to resurrect the pre-*Goldfarb* dependency test. If Congress had intended to require male applicants to prove dependency in order to qualify for the exception clause, it could simply and unambiguously have done so by adding a dependency requirement to the exception clause[9] rather than choosing the "complex and circuitous formulation" that it did. (Appellant's Brief at 25) Of course, any criteria for eligibility which contained a gender-based dependency test would be immediately suspect in light of the Court's prior cases. *Califano v. Goldfarb*, 430 U. S. 199 (1977); *Frontiero v. Richardson*, 411 U. S. 677 (1973).

Moreover, the meaning of the January, 1977, date which is included in the exception clause is not readily apparent from the legislative history surrounding its enactment.[10] Examination of this legislative history reveals the fact that very little consideration was given by Congress to the exception clause.[11] Furthermore, this legis-

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[9]Congress unambiguously legislated such a dependency test, applicable to both male and female applicants, as part of the 1982 exception clause revisions. Pub. L. 97-455, § 7(a), 96 Stat. 2501 (1982).

[10]Nowhere in the legislative history of the exception clause is there any explanation as to why this particular date was chosen over any other nor any explanation of the meaning of this date.

[11]The Carter Administration, after considering the effects of the *Goldfarb* decision, recommended several proposals aimed at eliminating the various gender-based distinctions remaining in the Social Security Act and addressing what was perceived as the problem of "windfall" benefits resulting from

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lative history reveals no intent by Congress to limit the operation of the exception clause by factoring out those

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the *Goldfarb* decision. One of these proposals would have established a new dependency test to be applied equally to male and female applicants for spousal benefits. *Social Security Financing Proposals: Hearings Before the Subcomm. on Social Security of the Senate Finance Comm.*, 95th Cong. 1st Sess. 117 (1977) (statement of Robert M. Ball); *President Carter's Social Security Proposals: Hearings Before the Subcomm. on Social Security of the House Ways and Means Comm.*, 95th Cong., 1st Sess., Pt. 1 at 158 (1977) (statement of Robert M. Ball). This proposal was examined in Congress at the same time that decoupling (correcting the over-indexing problem created in 1972), increases in the payroll tax rate, and other fundamental issues having to do with the financing and benefit structure of social security were being considered. On October 27, 1977, the House of Representatives, after considering the Carter Administration proposals, passed a social security financing bill that contained no specific provision addressing the perceived problem of "windfall" benefits. 123 Cong. Rec. 35406-07 (1977).

In contrast to the House-passed proposal, the Senate Finance Committee recommended, as part of a social security financing measure, the adoption of a pension offset provision. Under this proposal any claim for spousal benefits by an applicant whose work history was based on employment not covered by the Social Security Act would be offset dollar for dollar by the amount of any public pension received by the applicant. This provision was included in the social security financing bill accepted by the Senate on November 4, 1977. 123 Cong. Rec. 37200 (1977).

Because of the discrepancies between the Senate reform proposal and the bill passed by the House, the matter was referred to a Conference Committee with only 3 days remaining in the legislative session. The House conferees accepted the Senate concept of a pension offset provision but receded with an amendment adding an exception clause which postponed until December 1982 the full effectiveness of the pension offset provision. H.R. Conf. Rep. No. 95-837, 95th Cong., 1st Sess. 42 (1977). Only those who were eligible for full spousal benefits under the Social Security Act "as it was in effect and being administered in January, 1977" were eligible for inclusion within this exception clause.

The conference agreement, in the form of the Social Security Amendments of 1977, was presented to both the Senate

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men who had retired, or soon would retire, and who had made their retirement decisions in reliance upon their eligibility for spousal benefits.[12] The Secretary's inter-

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and the House on December 15, 1977. 123 Cong. Rec. 39132 (1977). Due to the urgent need for social security financing reform, the exception clause to the pension offset provision, along with the other security financing measures, were discussed and approved on December 15, 1977—the last day of the legislative session. The "Social Security Amendments of 1977" were signed into law by President Carter on December 20, 1977.

In order to pass the proposal on December 15, 1983, it was necessary for Congress to waive the three day waiting period before considering a conference report. 123 Cong. Rec. 39024 (1977) (remarks of Rep. Harris). As one Congressman cautioned:

> "[w]hile the amendment [exception clause to the pension offset] may eventually prove to be equitable and only deprive persons from receiving social security who can afford the loss, I believe this matter should have been subject to thorough study before becoming law, and I regret it did not follow the normal committee and floor consideration . . . Mr. Speaker, I fear this provision will bring us grief."

123 Cong. Rec. 39047 (1977) (remarks Rep. Whalen).

[12]The legislative history of the exception clause evidences a primary congressional concern for men like Mr. Mathews, who might have retired relying upon their eligibility to receive full spousal benefits. *See* H.R. Conf. Rep. No. 95-837, 95th Cong., 1st Sess. 72 (1977); S. Conf. Rep. No. 95-612, 1st Sess. 72 (1977). ("Inclusion of this exception to the . . . [offset] provision, reinforces its prospective nature and avoids penalizing *people* who are already retired, or close to retirement, from public employment and who cannot be expected to readjust their retirement plans to take account of the 'offset' provision that will apply in the future.") (emphasis added); Staff of Senate Comm. on Finance, 95th Cong., 1st Sess., *Summary of H.R. 9346, the Social Security Amendments of 1977 as Passed by the Congress (P.L. 95-216)* 7 (Comm. Print 1977) ("To assure that *persons* who have been counting on these benefits for many years and who are now at or nearing retirement age will not be adversely affected, H.R. 9346 includes a transitional exception under which certain individuals will not have their social

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pretation offers no protection for the reliance interests of these men—reliance interests which should be protected to the same extent as those of women.

A. The exception clause should be fairly interpreted to avoid an unconstitutional result.

The Court, in considering which construction to place on the exception clause, must choose that interpretation which avoids any question of constitutional validity if there is "a fair alternative construction." *Lewis v. United States*, 445 U. S. 55, 65 (1980). *See also Califano v. Yamasaki*, 442 U. S. 682 (1979); *United States v. Batchelder*, 442 U. S. 114, 122 (1979); *Crowell v. Benson*, 285 U. S. 22, 62 (1932). The Court is confronted with two alternative constructions. If the Secretary's interpretation is accepted, the exception clause must be viewed as the congressional re-enactment of a dependency test which was held unconstitutional by this Court in *Califano v. Goldfarb*.[13] By comparison, appellees offer a construction

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security benefits as spouses reduced by the amount of their public pension.") (emphasis added); Staff of the House Comm. on Ways & Means, 95th Cong., 1st Sess., *WMCP: 95-61 Summary of the Conference Agreement on H.R. 9346* at 5 (Comm. Print 1977) ("[the purpose of the exception clause] is to protect those *persons* who were expecting a social security dependency benefit based on their spouse's record." (emphasis added). It seems apparent that in referring to those women who might have relied upon entitlement to full spousal benefits, the conferees did not intend to limit the coverage of the exception clause to only those women, but, rather, to point to an example of these individuals who had a legitimate reliance interest which was deserving of protection.

[13]For example, the Secretary's interpretation would require that an applicant for husband's insurance benefits demonstrate that he:

(A) has filed application for husband's insurance benefits,

(B) has attained age 62, and

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which contains no reference to an unconstitutional gender-based dependency test.[14] The construction proffered by appellees both avoids a constitutional issue and is the better reading of the statute.[15]

B. The qualifying criteria of the exception clause should be interpreted to incorporate only constitutionally valid requirements for spousal benefits as which were "in effect . . . in January, 1977."

There is no disagreement between the Secretary and appellees that the exception clause incorporates by reference the eligibility criteria of subsections (c) and (f) of

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(C) was receiving at least one-half of his support, as determined in accordance with regulations prescribed by the Secretary, from [his wife] . . . .

(D) is not entitled to old-age or disability insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of his wife.

Former 42 U.S.C. § 402(c)(1). The Secretary asks the Court to apply the above statutory language, notwithstanding the fact that the dependency test in subparagraph (c) is visibly absent from Social Security Amendments of 1977. Pub. L. 95-216, § 334(b)(1), 91 Stat. 1544 (1977).

[14]Appellees' interpretation would require an applicant to meet the following subsection (c) eligibility requirements:

(A) has filed application for husband's insurance benefits,

(B) has attained age 62, and

(C) is not entitled to old-age or disability insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of his wife.

42 U.S.C. § 402(c) (1) (Supp. V).

[15]It is obvious that the construction by the Secretary requires the Court to review the constitutionality of the gender-based dependency test, while appellees' construction does not mandate judicial review of any constitutional questions. Appellees' alternative is obviously "fairly possible" as it simply reads subsections 202(c) and (f) of the Social Security Act in light of the *Goldfarb* decision.

the Social Security Act. There is also no disagreement that subsections (c) and (f) were judicially reviewed by the Court prior to the enactment of the exception clause. *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Califano v. Silbowitz*, 430 U.S. 924 (1977); *Califano v. Jablon*, 430 U.S. 924 (1977). It is readily apparent in Mr. Mathews' case that in order to qualify under the exception clause he must meet the requirements for subsection (c) entitlement. What is in dispute is whether Mr. Mathews and the class he represents must satisfy a dependency test as part of the requirements of subsections (c) or (f) as "in effect . . . in January, 1977."

The Court has repeatedly stated that, when Congress re-enacts a statute without change, Congress is presumed to be aware of the judicial interpretation given that statute and is further presumed to have adopted its judicial interpretation. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n. 8 (1975). *See also Merrill, Lynch, Pierce, Fenner, & Smith v. Curran*, 456 U.S. 353, 378-79, 388 (1982); *Georgia v. United States*, 411 U.S. 526, 533 (1973); *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 366 (1951). In applying this presumption to the present case, it can be seen that Congress, in enacting the exception clause, intended to incorporate subsections (c) and (f) as modified by *Goldfarb*. This means that the exception clause does not incorporate a gender-based dependency test, because no such dependency test existed in subsections (c) and (f) at the point in time in which the exception clause was enacted. Furthermore, because the gender-based dependency test was an unconstitutional provision, it is "as inoperative as though it had never been passed." *Norton v. Shelby County*, 118 U.S. 425, 442 (1886). Therefore, subsections

(c) and (f) "as in effect . . . in January, 1977" did not contain any requirements for proof of dependency.[16]

The Secretary's only rebuttal to this interpretation is to claim that, were appellees' interpretation accepted, "the exception clause would apply to essentially all applicants prior to December 1982" and that this "would largely vitiate the offset provision for the designated five-year period." (Appellant's Brief at 25) The Secretary implies that the January, 1977, date, without the construction given the exception clause by the Secretary, would, at the least, render the pension offset provision ineffective and, at the most, render the exception clause meaningless. This implication ignores the fact that the January, 1977, date has significance to classes of applicants other than spouses of deceased government workers. For example, the January, 1977, date affects the classes of young husbands, divorced husbands, and surviving divorced fathers. These classes of beneficiaries cannot meet January, 1977, eligibility requirements because there was no such beneficiary category in January, 1977. Social Security Claims Manual GN 02608.510 (June 1982). Further, all female appli-

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[16]*See Webb v. Harris*, 509 F. Supp. 1091 (N.D. Cal. 1981), *aff'd*, 701 F.2d 81 (9th Cir. 1983); *Wachtell v. Schweiker*, No. 80-8022 (S.D. Fla. Jan. 26, 1982) (*See* Mot. to Aff. App. C.). The Seventh Circuit, in a decision subsequent to this Court's decision in *Goldfarb*, interpreted a statute which incorporated a reference to the "Social Security Act as in effect on December 31, 1974." *Gebbie v. United States R.R. Retirement Board*, 631 F.2d 512 (7th Cir. 1980). In this case, male applicants who became eligible for social security spousal benefits as a result of the *Goldfarb* decision sought benefits also under the Railroad Retirement Act of 1974. The Retirement Board held that, based upon the language of the statute, the male applicants had to prove dependency in order to be entitled to additional benefits. The Seventh Circuit held that the language of the statute must be interpreted in light of the *Goldfarb* decision and the dependency test was no longer applicable. The Solicitor General did not seek review of this decision.

cants for divorced wives' or surviving divorced wives' benefits whose marriages lasted longer than 10 years but less than 20 years would not be eligible for the exception clause.[17] Thus, it can be seen that, despite the Secretary's claim, appellees' interpretation does give meaning to the January, 1977, date and does not render the pension offset provision ineffective for five years by way of universal extension of the exception clause.

C. The qualifying criteria for spousal benefits as "being administered in January, 1977" did not require male applicants to prove dependency.

Perhaps the most obvious key to the correct interpretation of the exception clause is the phrase "being administered in January, 1977." In January, 1977, subsections (c) and (f) were being administered by the Social Security Administration by delaying any decision as to whether or not to grant benefits under these subsections until this Court rendered a decision in *Goldfarb*. The Social Security Claims Manual required the reviewing office to send the following letter to any applicant for subsection (c) and (f) benefits:

> The current Law requires that claimants for (widower's) (husband's) benefits meet a one-half support requirement. Some Federal district courts have ruled that this requirement is unconstitutional; however, the Secretary of Health, Education and Welfare has appealed these rulings. On February 23, 1976, the U. S. Supreme Court noted probable jurisdiction of the case of *Goldfarb v. Secretary, HEW* (#75-699), but we do not expect the Court to hear the case until the fall of 1976. In the meantime, the law remains unchanged

[17]The change in length-of-marriage requirements did not occur until December, 1978. Social Security Amendments of 1977, Pub. L. 95-216, § 337(b), 91 Stat. 1548 (1977). The present law bases eligibility upon a marriage that lasted at least 10 years. 42 U.S.C. § 402(b)(1)(G) (Supp. V).

> and no payment can be made until a final decision has been rendered on the constitutionality of the one-half support requirement. Even though no payment may currently be made, your claim is being recorded and your rights are being protected. You will be notified of your entitlement or nonentitlement to benefits once the issue is finally resolved.

Social Security Claims Manual Transmittal No. 3844 (July 14, 1976). "If [an applicant] had applied for husband's insurance benefits in January, 1977 and met all the requirements except dependency, his application would have been allowed following the Supreme Court decision in *Califano v. Goldfarb*." *Rosofsky v. Schweiker*, 523 F. Supp. 1180, 1183-84 (E. D. N. Y. 1981). Thus, the phrase "as being administered in January, 1977" deferred to the decision of this Court in *Goldfarb*. After *Goldfarb* its meaning was clear—there is no gender-based dependency test incorporated into the exception clause.

Appellees have shown that the exception clause can be fairly construed so as not to include a gender-based dependency test. The eligibility requirements "in effect" and "being administered" in January, 1977, did not include proof of dependency. Therefore, the Court should interpret the exception clause as requiring no such proof.

II. If the exception clause of the pension offset provision incorporates by reference a gender-based dependency test, then the exception clause violates the equal protection component of the due process clause of the fifth amendment.

If the exception clause is held to incorporate subsections (c) and (f) as they existed prior to *Goldfarb*, then the gender-based dependency test has been resurrected, and the exception clause must be held to violate the equal protection component of the fifth amendment. After all, this is the very same dependency test (Former 42

U.S.C. § 402(f)) held unconstitutional by the Court in *Goldfarb*.[18] Since the Court has not deviated in the slightest degree from that holding, it is evident that, despite its new packaging, the gender-based dependency test is just as unconstitutional today as it was in 1977.

Although the Secretary attempts to portray this dependency test as being in a "different context", the Court should be careful not to allow semantics to alter the obvious. In its new form, the gender-based dependency test discriminates on the basis of sex by requiring a husband to prove dependency before being eligible for inclusion within the exception clause, while requiring no such proof of a wife. Thus, as was the situation prior to *Goldfarb*, the social security contributions of men are now worth more than the contributions of women. Although the Secretary contends otherwise, "[s]ex is exactly what . . . [the exception clause] is based on." *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 713 (1978) (quoting Manhart v. Los Angeles Department of Water and Power, 553 F. 2d 581, 588 (9th Cir. 1976)).

The touchstone of equal protection has been that "Congress treat similarly situated persons similarly. . . ."

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[18]It is important to note that both Leon Goldfarb and Robert Mathew are retired federal employees. Although the Court's decision in *Goldfarb* entitled Leon Goldfarb to receive full spousal benefits because the gender-based dependency test sought to be applied to him to deny his spousal benefits was held unconstitutional, the Secretary now contends that the very same gender-based dependency test must be applied to Robert Mathews to deny him spousal benefits. If there is any difference between the equities involved in the cases of Leon Goldfarb and Robert Mathews, then the equities involved in Mr. Mathews' case weigh more heavily in favor of his receipt of full spousal benefits. While Mr. Goldfarb retired at a time in which all men were automatically denied full spousal benefits unless they could prove dependency, Mr. Mathews retired at a time in which all men were granted full spousal benefits without proof of dependency.

Rostker v. Goldberg, 453 U. S. 57, 79 (1981). When a statute treats similarly situated people differently, solely because of differences in gender, the Court's decisions have held "that the traditional minimum rationality test takes on a somewhat 'sharper focus'." *Michael M. v. Sonoma County Superior Court*, 450 U. S. 464, 468 (1981). Application of this heightened scrutiny to the exception clause requires that the Secretary "carry the burden of showing an 'exceedingly persuasive justification' for the classification." [19] *Mississippi University for Women v. Hogan*, — U. S. —, 102 S. Ct. 3331, 3336 (1982) (quoting Kirchberg v. Feenstra, 450 U. S. 455, 461 (1981)).

The Secretary attempts to meet its burden by showing that the dependency test incorporated into the exception clause (1) serves the important governmental objective of protecting reliance interests of retirees[20], and (2) is substantially related to the achievement of that objective. *Califano v. Webster*, 430 U. S. 313, 316-17 (1977); *Craig v. Boren*, 429 U. S. 190, 197 (1976). Appellees contend that the Secretary has not met this burden.

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[19]Justice O'Connor, writing for the majority in *Hogan*, also noted that "[t]he issue is not whether the benefited class profits from the classification, but whether the State's [government's] decision to confer a benefit only upon one class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal." *Mississippi University for Women in Hogan*, — U. S. —, 102 S. Ct. 3331, 3340 n.17 (1982).

[20]The Secretary also argues that the exception clause "promotes the collective interest of ensuring that citizens have confidence in the just and orderly processes of government." (Appellant's Brief at 34) While this is an admirable goal, there is absolutely no indication in the legislative history of the exception clause that this goal was given even minor consideration. Further, the Secretary offers no explanation as to why a gender-based dependency test is needed to reach this purported goal, even if it had been considered by Congress.

A. The protection of gender-based reliance interests is not an important governmental objective.

As will be shown, the exception clause protects the reliance interests of men and women who are affected by the pension offset provision unequally—it protects the reliance interests of all women, while protecting the reliance interests of dependent men only. If the important governmental objective sought to be furthered by enactment of the exception clause is the protection of reliance interests of all people, both men and women, then the exception clause is unconstitutional because the means chosen are not substantially related to that end. Alternatively, if the governmental purpose sought to be furthered is the protection of gender-based reliance interests, then the exception clause is unconstitutional because protection of gender-based reliance interests is not an important governmental objective.

The Secretary identifies the important governmental objective sought to be furthered by the exception clause as the protection of "legitimate reliance interests of retirees under pre-*Goldfarb* law." (Appellant's Brief at 33) This objective cannot be an important governmental objective since there is no class of people whose reliance upon pre-*Goldfarb* law needs to be protected. The only people who relied upon pre-*Goldfarb* law were those who made their retirement decisions prior to March, 1977, when *Goldfarb* was decided.[21] These people are not affected by

[21]A comparison of two examples clearly demonstrate this fact. Consider Male A and Female A who retire in February, 1977. There is no doubt that Female A, makes her decision to retire from government employment at a time in which she is eligible to receive the windfall of an unreduced spousal benefit. 42 U.S.C. § 402(b). If Female A planned her retirement on unreduced spousal benefits she did so in reliance upon the

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the government pension offset, and therefore they do not need to be protected from it.

Although the Secretary repeatedly refers to "reliance interests", no satisfactory explanation is given as to the

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law as it existed in February, 1977. Male A, on the other hand in reaching his retirement decision, does so at the time in which he is ineligible to receive spousal benefits unless he can prove dependency. Female A has no need for the protection of an exception clause since the pension offset does not affect the amount of her spousal benefits. Of course, had the pension offset been drafted in such a way so as to affect her, a legitimate reliance interest on pre-*Goldfarb* law would be present.

Compare this example with Male B and Female B who retire in October, 1977. The female in this example makes her retirement decision at a time in which she is eligible for unreduced spousal benefits, *Goldfarb* having not affected the statutory entitlement criteria as it relates to women. Unlike the female in the first example, Female B cannot be said to plan her retirement on the basis of pre-*Goldfarb* spousal benefit provisions. At most Female B had an *expectation* under pre-*Goldfarb* law that when she retired she would receive unreduced spousal benefits. For her the era of pre-*Goldfarb* entitlement is largely theoretical, since her act in reliance on eligibility, her retirement, occurs in October, 1977. Her reliance is predicated not on pre-*Goldfarb* eligibility criteria for spousal benefits but on the spousal benefit provisions in force on the date she made her decision to retire—October, 1977. Suprisingly, the pension offset provision does not affect Female B in any way, since her retirement also takes place prior to the effective date of the offset provision. Thus, the exception clause is not designed to protect her act of reliance on a given statutory scheme.

Male B can, as a result of *Goldfarb*, legitimately make his retirement decision based upon eligibility for unreduced spousal benefits in addition to his government pension. He has no need for an exception clause. The pension offset is not applicable to him since he retired prior to December 1, 1977. Despite any apparent congressional intent to the contrary, Male B will continue to receive both his government pension and spousal benefits for his lifetime.

nature of this interest.[22] *Ballentine's Law Dictionary* (3d ed. 1969) at 1085 defines "reliance" as "[t]rust or confidence, particularly in promises and representations." It further defines "reliance interest" as a "term of art in the law of damages for breach of contract. Expenditures made, or property transferred or consumed, by the party not in default in reliance on the contract." In analogizing this

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[22]The Secretary has historically been inconsistent in attempting to define the nature of the reliance interest purportedly protected by the exception clause. In *Rosofsky*, the Secretary explained to the Court:

> only persons who could have planned their retirements on the assumption that they would receive unreduced spousal benefits were those who would have been eligible for spousal benefits under the Act as it existed in January, 1977. Those persons receiving government pensions who become eligible for spousal benefits under the Social Security Act solely as a result of the March, 1977 decisions and the December, 1977 amendments must have planned their retirements on the assumption that they would not receive any spousal benefits at all.

Jurisdictional Statement at 12, *Schweiker v. Rosofsky* (Case 81-1551) (filed February 18, 1982). When the Secretary is faced with a case in which a genuine reliance interest is present, and yet goes unprotected by the exception clause, the emphasis changes. In these cases the Secretary attempts to introduce a quantitative measurement into the definition of "reliance interest" in order to imply that these genuine reliance interests are not legitimate and thus justify to their exclusion from the protection of the exception clause. For example, in *Webb* the Secretary stated that "Congress was justifiably concerned with protecting those persons—primarily wives, but also husbands, dependent on their wives for one-half of their support—who, for a *significant* period of time, relied on receiving full spousal benefits, and planned their retirements accordingly." Brief for Appellant at 20, *Webb v. Schweiker*, 701 F. 2d 81 (9th Cir. 1983) (emphasis added). In *Wachtell* the Secretary admitted that the loss of spousal benefits by applicants who relied upon the result of the *Goldfarb* decision would upset some retirement plans, but then attempted to minimize the importance of this frustration of reliance interests by saying that *"few if any* plans [would be upset] in a *significant* say". Reply brief for Appellant at 2, *Wachtell v. Schweiker*, No. 82-5552 (11th Cir. filed Oct. 12, 1982).

term of art from the law of contracts to the present situation, it can be seen that reliance interests herein are those retirement decisions made and acted on by individuals who depended on the law as it existed at the time their decisions were made, and which decisions and actions would be to their detriment should the law change. By looking at hypothetical pairs of retirees who are themselves governmental workers and whose spouses are covered employees, it can be seen that the exception clause affects the reliance interests of men and women unequally.

> *Example 1:* Male A and Female A retire and file for benefits in November, 1977—8 months after *Goldfarb*, 1 month prior to enactment of government pension offset. Neither will reach age 62 until December, 1977.

Male A will have his spousal benefits reduced by the amount of his government pension. Female A will receive full, unreduced spousal benefits.[23] Male A relies upon post-*Goldfarb* law and retires expecting to receive full spousal benefits. Female A relies upon post-*Goldfarb* law and retires expecting to receive full spousal benefits. Yet, due to enactment of the exception clause, Male A and Female A, who both relied upon the same law at the same time, are treated disparately. Male A, in whose position

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[23]Neither Male A nor Female A will be eligible for spousal benefits until they reach age 62. 42 U.S.C. §§ 402(b)(1)(B), 402(c)(1)(B) (Supp. V). As Male A does not reach age 62 until December, 1977, his application is not deemed "filed" until that month. His application is then subject to the pension offset provision which became effective December 1, 1977. Social Security Amendments of 1977, Pub. L. No. 95-216, § 334(f), 91 Stat. 1546 (1977). Since he cannot demonstrate dependency, he will not be eligible for inclusion in the exception clause. Although Female A is in an identical position, she will be eligible for inclusion within the exception clause based upon the assumption that she relied upon pre-*Goldfarb* eligibility in making her retirement decision. The same presumption will not apply to Male A.

Mr. Mathews finds himself, cannot undo his retirement. Had he known that he would not receive unreduced spousal benefits, he probably would have postponed his retirement to a later date in order to increase the amount of his government pension.

> *Example 2:* Male B and Female B retire in November, 1982—5 years and 6 months after *Goldfarb*, 4 years and 11 months after enactment of the government pension offset.

Male B will have his spousal benefits reduced by the amount of his government pension. Female B will receive full, unreduced spousal benefits. Again, Male B and Female B make their retirement decisions based on the same law at the same time—they both rely upon the law in effect around November, 1982. Yet Female B receives a windfall benefit based upon her fictional reliance on the law as it was in effect 4 years and 11 months ago. In other words, Female B is protected from the government pension offset which was enacted in December, 1977, whereas Male B is not so protected. Had it not been for the exception clause itself, Female B would not have relied upon the receipt of unreduced spousal benefits while making her retirement decision.

As can be seen from the foregoing hypotheticals, the exception clause protects the reliance interests of similarly situated persons differently, solely on the basis of sex. For Congress to seek to protect the reliance interests of women to a greater extent than the reliance interests of men, it must be shown that such treatment is justified due to past discrimination sought to be ameliorated, *Califano v. Webster*, 430 U.S. 314 (1977), otherwise, "the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suf-

fer from an inherent handicap or to be innately inferior, [and] the objective itself is illegitimate." *Mississippi University for Women v. Hogan*, — U.S. —, 102 S. Ct. 3331, 3336 (1982). The Secretary has shown no such compensatory intent. Indeed, it is hard to imagine how reliance interest of non-dependent male government workers could have been favored in the past such that a favoring of the reliance interests of non-dependent female government workers would be justified at present. Therefore, if the governmental objective behind enactment of the exception clause is the protection of gender-based reliance interests, the exception clause is unconstitutional. Such an objective is not an important governmental objective.[24]

B. The exception clause is not substantially related to the protection of reliance interests of retirees.

If the Court finds that the important governmental objective sought to be furthered by the exception clause is the protection of reliance interests, across the board, rather than protection of gender-based reliance interests, then the exception clause must still be held to violate equal protection—because the means chosen are not substantially related to that end. This violation of equal protection results not from the use of an exception clause but, rather, from the gender-based dependency test employed in the exception clause to determine which persons are eligible for inclusion within its provisions.

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[24]The Secretary's citation to *United States Railroad Retirement Board v. Fritz*, 449 U. S. 166 (1980) is not to the contrary. In *Fritz*, the Court applied the traditional rational basis standard of review since the questioned statute did "not burden fundamental constitutional rights or create 'suspect' classifications." *Id* at 174. A different decision might have been reached had the Railroad Retirement Act of 1974 contained a gender-based dependency test and the Court employed the intermediate standard of review.

The Secretary wrongly contends that the reliance interests of persons who became eligible for spousal benefits as a result of *Goldfarb* "have been accommodated in the starting date of the offset provision rather than through the exception clause," Appellant's Brief at 39 n. 28, and that those persons who became eligible after *Goldfarb* and are affected by the pension offset have "no reliance interest to be protected."[25] (Appellant's Brief at 38) This contention is based upon the assumption that, since the exception clause did not take effect until December 1, 1977, any reliance interests formed during the nine months between *Goldfarb* and enactment of the government pension offset provision are not affected by the government pension offset provision. This assumption is erroneous. It is therefore evident that the exception clause employs an invalid classification because it is based upon an erroneous assumption, and was thereby not "determined through reasoned analysis." *Mississippi University for Women v. Hogan*, — U. S. —, 102 S. Ct. 3331, 3337 (1982).

This lack of a "reasoned analysis" is further evident upon examination of the legislative history of the exception clause. Such an examination discloses no congressional finding of the existence of any reliance interests based upon pre-*Goldfarb* law, nor why a five-year exception was needed to protect those interests if they

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[25]Statistics from the Social Security Administration reveal that 5,399 husbands were denied spousal benefits due to the pension offset provision between December 1, 1977 and December 30, 1978. J. Bondar, *Initial Effects of Elimination of the Dependency Requirement on Entitlement to Husband's and Widower's Benefits*, Research & Statistics Note No. 2 at 11 (SSA Office of Research Statistics, June 28, 1982). There is no empirical data, and the Secretary has offered none, which conclusively demonstrates that none of these applicants premised their retirement on receipt of unreduced spousal benefits.

did exist. All that can be found in the record concerning the existence of a reliance interest based upon pre-*Goldfarb* law is the statement that "there *may be* large numbers of women, especially widows in their late fifties . . . whose retirement income was planned for on the assumption of the availability of full wife's or widow's benefits under social security." H.R. Conf. Rep. 95-837, 95th Cong., 1st Sess. 72 (1977), S. Conf. Rep. 95-612, 95th Cong., 1st Sess. 72 (1977) (emphasis added). Furthermore, there is no documentation showing that this presumed reliance interest is any more legitimate than the reliance interests of men such as Mr. Mathews. It is apparent that little, if any, legislative analysis was made of the retirement decision-making process and that this lack of analysis resulted in a statute which does not substantially protect the reliance interests of retirees.[26] If the exception

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[26]Instead, the exception clause is primarily the product of a congressional desire to put together a stop-gap measure to buy time until the problem of "windfall" benefits could be further studied and dealt with. This is evident in the modifications made by Congress since 1977 in the area of entitlement to spousal benefits. The first modification occurred in December, 1982, when Congress extended the exception clause for an additional seven months, this time basing eligibility on a non-gender based dependency test. The second modification occurred with the passage of the Social Security Amendments of 1983. These amendments provided for a new pension offset which offset the amount of any spousal benefits by two-thirds the amount of the public pension received by those who became entitled to receive public pensions after June, 1983.

These modifications show, since the gender-based dependency test has been eliminated, that a gender-based dependency test is not necessary to accomplish the important governmental objective embodied in the exception clause. These modifications also show, since the time period during which the exception clause was in effect was extended, that the exception clause was not merely a transitional rule to protect pre-*Goldfarb* reliance interest. In December, 1982, everyone who had purportedly relied upon pre-*Goldfarb* law was aware, and had been for five years, that the pension offset provisions would be applied to them beginning in December, 1982.

clause was not based upon a reasoned analysis, then it must have been based upon "the mechanical application of traditional, often inaccurate assumptions about the proper roles of men and women. *Mississippi University for Women v. Hogan*, — U. S. —, 102 S. Ct. 3331, 3337 (1982).

The Secretary attempts to show that the exception clause employees means which are substantially related to the protection of reliance interests of retirees who planned their retirement upon the assumption that they would receive full spousal benefits. However, the Secretary has failed to show this substantial relationship. It can readily be seen that the exception clause is underinclusive. It does not protect the legitimate reliance interests of several categories of retirees.

Mr. Mathews is a prime example of a category of retirees whose reliance interests go unprotected. Mr. Mathews' retirement decision was made on November 18, 1977. Prior to his retirement he inquired as to his eligibility for spousal benefits and was advised that he was eligible to receive unreduced husband's insurance benefits. Tr. 42 There can be no doubt that at the time Mr. Mathews retired men were eligible for full spousal benefits without proving dependency and that his decision to retire was based in part on the belief that he would be eligible for social security benefits. Although Mr. Mathews relied upon his eligibility to receive full spousal benefits, neither the exception clause nor the effective date of the pension offset provision protect his reliance interest.

The pension offset provision was drafted to "apply with respect to monthly insurance benefits . . . beginning with the month in which this Act is enacted, on the basis of applications filed in or after the month in which this

Act is enacted." Social Security Amendments of 1977, § 334 (f), 91 Stat. 1546 (1977). Since the amendments were enacted on December 20, 1977, the pension offset automatically applied to all applications for spousal benefits filed on or after December 1, 1977. Mr. Mathews filed his application on December 15, 1977. Tr. 42 Although he relied upon entitlement to spousal benefits in making his retirement decision almost a full month prior to December 15, 1977, the effective date of the pension offset provision does not protect his reliance interest. Moreover, the exception clause does not protect Mr. Mathews' reliance interest for the reason that he cannot prove dependency. And Mr. Mathews' case is not an extreme example. The same anomaly was faced by Peter Caloger,[27] Sidney Webb,[28] and Stanley Wachtell.[29] Thus, it is obvious that the exception clause fails to adequately protect genuine reliance interests, and that this failure is the result of its incorporation of a gender-based dependency test which renders the statute underinclusive.

C. The exception clause is a legislative attempt to reinstate a provision previously held unconstitutional, and is therefore unconstitutional itself.

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[27]Peter Caloger retired in August of 1977 but did not file his application for spousal benefits until May, 1978, when his wife first became eligible for a worker's benefit. *Caloger v. Harris*, 1981 Unempl. Ins. Rep. (CCH) ¶17,754 (D. Md. Mar. 25, 1981).

[28]Sidney Webb retired from his position with the State of California in March, 1977. He filed an application for spousal benefits in September, 1977 and met all eligibility criteria for entitlement on December 2, 1977. Jurisdictional Statement at 5, *Heckler v. Webb*, No. 82-2094 (filed June 21, 1983).

[29]Stanley Wachtell filed his application for spousal benefits on August 23, 1977, but did not meet all eligibility criteria for entitlement until December 1, 1977. *Wachtell v. Schweiker*, No. 80-8022 (S. D. Fla. Jan. 26, 1982) (See Mot. to Aff. App. C.).

Even assuming that there does exist a class of people who relied upon pre-*Goldfarb* law, it is not at all clear that this reliance interest is deserving of protection in the manner chosen by Congress. If this class did rely upon pre-*Goldfarb* law, then it relied upon a law which was unconstitutional as violative of equal protection. If the Court gives effect to Congress' attempt to re-legislate the unconstitutional, then the integrity and finality of the decisions of the judicial branch have been seriously undermined. The door will be opened to allow the legislature, when dissatisfied with a decision of the courts, to legislate away the effects of such a decision.

For example, the State of Mississippi might decide to extend its discriminatory admissions policy at the Mississippi University for Women, notwithstanding the Court's decision in *Mississippi University for Women v. Hogan*, — U. S. —, 102 S. Ct. 3331 (1982). The Mississippi Legislature could easily accomplish this effect by denying admission of all students to the School of Nursing, but exempting from this denial all students who relied upon their eligibility to attend the School prior to the Court's decision in *Hogan*. This exemption would have the same effect as the reinstitution of a gender-based dependency test in the exception clause involved in the case at bar. Only female applicants would be eligible for admission, since only female applicants could have had a reliance interest based upon eligibility criteria prior to *Hogan*. The effect of such an exemption, like the exception clause herein, would be to perpetuate the unconstitutional.

Appellees do not argue that protection of reliance interests is not an important governmental objective. Appellees concede that the Court, in a variety of cases differing from the one at bar, has recognized the importance

of reliance interests which were based upon an old rule of law subsequently changed. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, — U. S. —, 102 S. Ct. 2858 (1982). *Procunier v. Navarette*, 434 U. S. 555 (1978); *Lemon v. Kurtzman*, 411 U. S. 192 (1972). However, these cases differ fundamentally from the case now before the Court in that they all involved *judicial* protection of reliance interests which were based upon a statute or an old rule of law subsequently changed by *judicial* action. Appellees do not contend that Congress may not also protect reliance interests when it modifies a statute. *United States Railroad Retirement Board v. Fritz*, 449 U. S. 166 (1980). Therefore, appellees do not contest the constitutionality of Congress' enactment of an exception clause. What appellees do contest is the constitutionality of an exception clause which reinstitutes a provision previously held unconstitutional by this Court. The exception clause here at issue is objectionable because it not only delays, in the name of reliance interests, the effect of the government pension offset provision, but it also delays the effect of the Court's decision in *Goldfarb*.[30]

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[30]Even though the Secretary appears to find support for the proposition that unconstitutional provisions can be given effect for a limited time even after they have been adjudicated unconstitutional (Appellant's Brief 36, 37 n. 27) a closer examination shows that the issue presented in the case at bar has not been decided by this Court. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, — U. S. —, 102 S. Ct. 2858 (1982), the Court delayed the effect of its decision in order to give Congress time to reconstitute the bankruptcy courts. *Id.* at 2880. This delay did not allow the continuation of unconstitutional acts—it did not permit bankruptcy judges to continue to adjudicate cases and controversies, like the one in *Northern*, which were committed to Article III courts. Also, the Court's decision to delay was not based upon the reliance of litigants, like Northern Pipeline, to have their cases decided by a bankruptcy judge. In *Lemon v. Kurtzman*, 411 U.S. 192

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III. The inverse severability clause of the pension offset provision unconstitutionally obstructs the exercise of judicial review.

Because Congress anticipated the possibility that the exception clause would be found unconstitutional, it enacted an accompanying inverse severability clause.[31] This clause is inverse because it directs that upon a finding of unconstitutionality the grace period granted by the exception clause shall be nullified. Social Security Amendments of 1977, Pub. L. 95-216, § 334(g) (3), 91 Stat. 1546 (1977). The effect of such a nullification is to apply the pension offset to all applicants for spousal benefits who had been exempted from its effect and, further, to foreclose recovery by those who successfully challenge the constitutionality of the exception clause. Thus, the purported impact of the inverse severability clause is to preclude a reviewing court, in advance of litigation, from

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(1973), which allowed reimbursement to schools for expenditures made in reliance on an unconstitutional statute, no allowance was made for reimbursement for any future expenses. Thus, the Court did not allow the perpetuation of an unconstitutional statute.

[31]Appellees have chosen the term inverse severability to distinguish the present provision from other severability clauses. The traditional severability clause recognized by the Court provides that if a portion of a statute has been stricken as invalid, the remainder is self-sustaining and capable of enforcement without regard to the stricken portion. The Court, on many other occasions, has affirmed the validity of this type of severability clause. *Buckley v. Valeo*, 424 U.S. 1 (1976); *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Jackson*, 390 U.S. 570 (1968); *McElroy v. United States*, 361 U.S. 281 (1959); *Electric Bond & Share Co. v. SEC*, 303 U.S. 419 (1938); *Watson v. Buck*, 313 U.S. 387 (1941); *Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210 (1932); *Dorchy v. Kansas*, 264 U.S. 286 (1924). By contrast, the severability subsection of the exception clause is an "inverse" provision. Specifically, it seeks to invalidate the entire exception clause if any individual provision is held invalid.

granting any tangible relief from the unconstitutional underinclusiveness of the exception clause to the only class harmed by such underinclusiveness. Because Congress cannot constitutionally impede the exercise of federal judicial power in this way, the inverse severability clause is invalid and cannot be enforced.

The inherent power of an article III court to extend the coverage of an unconstitutionally underinclusive statute to the class aggrieved by the exclusion is well established and not in dispute here. *Califano v. Westcott*, 443 U. S. 76, 89 (1979); *Welsh v. United States*, 398 U. S. 333, 361 (1970) (Harlan, J. concurring). It is true, as the Secretary maintains (Appellant's Brief at 45, 46), that in deciding whether to exercise this power, the Court has generally sought to ascertain and follow the remedial design of the legislature which enacted the classification under review.[32] The Court has, for example, given effect to severability clauses which provide that some form of relief be granted the injured parties before it. *Califano v. Westcott*, 433 U. S. 76 (1979), *Welsh v. United States*, 398 U. S. 333 (1970), *INS v. Chadha*, — U. S. —, 103 S. Ct. 2764 (1983). In addition, the Court has remanded initial reso-

[32]The Court has also noted that "extension, rather than nullification, is the proper [remedy]" for an underinclusive statute. *Califano v. Westcott*, 433 U.S. 76, 89 (1979). The *Westcott* decision noted that the Court "regularly has affirmed District Court judgment ordering that welfare benefits be paid to members of an unconstitutionally excluded class" *Id.* at 90. *Califano v. Goldfarb*, 430 U.S. 199 (1977), *aff'g* 396 F. Supp. 308 (E.D.N.Y. 1975); *Califano v. Silbowitz*, 430 U.S. 924 (1977), *aff'g* 397 F. Supp. 862 (S.D. Fla. 1975); *Califano v. Jablon*, 430 U.S. 924 (1977), *aff'g* 399 F. Supp. 118 (D. Md. 1975); *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975), *aff'g* 367 F. Supp. 981 (D.N.J. 1973); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973), *aff'g* 345 F. Supp. 310 (D.D.C. 1972); *Richardson v. Griffin*, 409 U.S. 1069 (1972), *aff'g* 346 F. Supp. 1226 (D. Md. 1972).

lution of the question of relief from unconstitutionally underinclusive state statutes to the courts of the states which enacted them. *Wengler v. Druggists Mutual Insurance Co.*, 446 U. S. 142, 153 (1980); *Orr v. Orr*, 440 U. S. 268, 271-373 (1979); *Stanton v. Stanton*, 421 U. S. 7, 17 (1975). But the Secretary cites no case, and appellees have found none, in which this Court has honored an inverse severability clause which purports to prevent a federal court, in advance of litigation challenging the constitutionality of the statute, from awarding any form of tangible relief to members of the only class injured by it.

It is not surprising that the Court has never upheld this type of inverse severability clause such as the one at issue here, for the effect of such a provision is to eviscerate the process of judicial review. In the present case, for example, the men denied spousal benefits by virtue of the underinclusiveness of the exception clause are warned, in advance of litigation, that a successful constitutional challenge to the statutory source of their injury will be fruitless. The inverse severability clause leaves no doubt that these men can vindicate their constitutional right to equal protection only by causing others to forfeit benefits they have previously been entitled to. Few potential litigants who recognize this inevitability will be so committed to the principle of equality, or so callous about the consequences of their own "success", to pursue this sort of abstract and ambiguous vindication of their rights. Even fewer lawyers will be motivated to litigate claims which hold out to their clients no possibility of any tangible return, monetary or equitable.[33]

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[33]Even if the deterrent effects of the inverse severability clause are overcome and, as here, a lawsuit challenging the

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These practical obstacles to the effective exercise of judicial review show that the inverse severability clause is unconstitutional in at least two respects. First, it purports to preclude members of appellees' class from receiving any relief from the unconstitutional injury inflicted on them by the exception clause. Second, the inverse severability clause purports to curtail the jurisdiction of the federal courts to review the constitutional claim of appellees' class by withdrawing the class' standing to sue.

A. The inverse severability clause denies appellees' right to an adequate remedy for an unconstitutionally inflicted injury.

The Secretary maintains that "the issue of relief is not part of the federal constitutional right to equal protection." (Appellant's Brief at 50) Such a contention exhibits an astounding ignorance of the efforts expended

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constitutionality of the pension offset provision is filed and is successful on the merits, it is unclear how a reviewng court bound by the clause can gve practical effect to its judgment. There is, for example, serious doubt as to whether a court may properly order termination of federal benefits to a nationwide class of recipients when no member of that class has appeared before the court. *Welsh v. United States*, 398 U.S. 333, 364 n.16 (1970). *See also*, LaFrance, *Problems of Relief in Equal Protection Cases*, 13 Clearinghouse Rev. 438, 440 (1979). If such an order is nonetheless entered, its proper scope is equally problematic. At the least, the court would have to determine whether prospective nullification would be sufficient to satisfy the inverse severability clause or whether recoupment of benefits previously paid to the class favored by the exception would also be required. One possible result of these uncertainties is illustrated by *Rosofsky v. Schweiker*, 523 F. Supp. 1180 (E.D.N.Y. 1981) in which the district court, after holding the pension offset provision unconstitutional and acknowledging the limits imposed by the inverse severability clause, nether extended nor nullified the five-year grace period granted to the class favored by the exception, thus giving no effect at all to the judgment of unconstitutionality. *Id.* at 1187-88.

by this Court in assuring that persons harmed by violations of equal protection secure relief from that harm. One need look no further than *Brown v. Board of Education*, 347 U. S. 453 (1954) to see an example of the importance placed by the Court on a constitutionally adequate form of relief for vindication of a violation of the equal protection guarantee.

In *Brown* the Court was not satisfied to simply issue a declaratory judgment that racial segregation of the public schools was unconstitutional; it ordered that all necessary steps be taken "to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases." *Brown v. Board of Education*, 349 U. S. 294, 301 (1955). Seventeen years later, in *Swann v. Charlotte-Meklenburg Board of Education*, 402 U. S. 1 (1971), the Court reaffirmed the central role of a proper remedy for the vindication of constitutional rights. Upholding a district court's order requiring district-wide school busing to vindicate the *Brown* guarantee, the Court stated that

> [O]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent equitable remedies . . . as with any equity case the nature of the violation determines the scope of the remedy.

Id. at 15-16.

But the concept that a remedy for the injury inflicted by violation of a constitutional right is an essential part of the right itself was well settled long before *Brown*. It can be traced at least as far back as Blackstone, and through him to *Marbury v. Madison*, 5 U. S. (1 Cranch)

137 (1803).[34] Our jurisprudence has always rested on the proposition that:

> Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies to grant the necessary relief. It is also well settled that where legal rights have been invaded and a federal statute provides for a general right to sue for that invasion federal courts may use any available remedy to make good the wrong done.

Bell v. Hood, 327 U. S. 678, 684 (1946).

The independence of the remedial power of the federal courts from obstruction by Congress is also firmly established. The Court has sustained restrictions imposed by Congress on its authority to grant particular remedies for constitutional violations only when there existed alternative, constitutionally adequate remedies by which resulting injuries could be redressed. *Cary v. Curtis*, 44 U. S. (3 How.) 236, 250 (1945), *Lockerty v. Phillips*, 319 U. S. 182, 187-89 (1943); *Yakus v. United States*, 321 U. S. 414, 444 (1944). *See also Crowell v. Benson*, 285 U. S. 22, 60 (1932); Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 Yale L. J. 498, 524-

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[34] In the *Commentaries on the Laws of England*, Blackstone wrote that "[i]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded . . . [It] is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress." 3 W. Blackstone, *Commentaries* *23, *109. Chief Justice Marshall relied on Blackstone's summation for his statement in *Marbury* that "[t]he very essence of civil liberty lies in the right of the individual to claim the protection of the laws whenever he receives an injury. . . . The government of the United States has been emphatically termed a government of laws not of men. It will certainly cease to observe this high appellation if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison*, 5 U. S. (1 Cranch) 137, 163 (1803).

32 (1974); Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectric*, 66 Harv. L. Rev. 1362, 1366-67 (1953).

The proposition that a federal court has the inherent power and responsibility to provide a remedy for an unconstitutionally inflicted injury is the basis for this Court's decisions in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U. S. 388 (1971) and its progeny, *Davis v. Passman*, 442 U. S. 228 (1979); *Carlson v. Green*, 446 U. S. 14 (1980); and *Bush v. Lucas*, — U. S. —, 103 S. Ct. 2404 (1983). In *Bivens* the Court found the authority to fashion a damage remedy against federal officials for violations of fourth amendment rights in both the judicial responsibility to remedy unconstitutional wrongs, *supra* at 395-96 and in Congress' failure to prescribe an alternative, constitutionally adequate remedy *supra* at 397.

In *Davis*, which involved a claim of sex discrimination by a discharged congressional employee, the Court extended the *Bivens* principle to fifth amendment equal protection rights, of the kind at issue in the present case. Once again the Court emphasized the responsibility of a federal court to afford a remedy for the injury caused by a violation of constitutional rights. *Supra* at 245. More importantly, the Court approved a damage remedy in *Davis* despite Congress' deliberate decision to exempt itself from all remedies for employment discrimination that were made available to executive branch employees through Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 e-16. Congress' decision to foreclose all statutory remedies to the petitioner in *Davis* thus did not prevent a federal court from affording her an adequate constitutional remedy. *Supra* at 247.

Carlson and *Bush* are in the same vein. In *Carlson* the Court sustained a damage action for violation of eighth amendment rights, finding the alternative statutory remedy through the Federal Tort Claims Act "not a sufficient protector of the citizen's constitutional rights." *Supra* at 23. In *Bush*, while a damage claim for violation of first amendment rights was disallowed, the disallowance was firmly premised on the availability of a wholly adequate alternative statutory remedy for the constitutional violation. *Supra* at 4756-57.

The *Bivens* series of cases concerns the availability of damage remedies. But the central principle upon which these cases rest—that a person injured by unconstitutional government action is entitled to an adequate remedy by virtue of the article III powers of the federal courts and by the very nature of the constitutional right itself—plainly governs the case at bar.[35]

The Secretary nevertheless argues that appellees' class can receive a constitutionally adequate remedy simply by "obtaining a judicial decree that the exception provision violates" the equal protection guarantee. (Appellant's Brief at 48) Their injury is remedied, according to the Secretary, if similarly situated women lose their own eligibility for spousal benefits, for this assures that they are "eligible for Social Security benefits on the same terms as women." (Appellant's Brief at 48, 49) But this argument also disregards the decisions of the

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[35]The Court's recent elaboration of the doctrine of presidential immunity is not to the contrary. In *Nixon v. Fitzgerald*, — U. S. —, 102 S. Ct. 2690 (1982) the doctrine was found to shield the president completely from damage liability for unconstitutional injuries inflicted by his official acts. Nevertheless, the Court emphasized the importance of the fact that alternative remedies were available to redress the injuries for which damages were sought. *Id.* at 2704-05 n. 37.

Court which draw a clear distinction between the correction of an unconstitutional classification and the grant of a remedy for the injury caused by such a classification. This distinction is the basis for Justice Harlan's concurring opinion in *Welsh v. United States*, 398 U.S. 333 (1970). *Welsh* was an appeal from a criminal conviction of a conscientous objector whose objection to war was based upon ethical, rather than religious beliefs, for his refusal to be inducted into the military. Justice Harlan construed the statute to limit conscientious objector status to only those men whose opposition to war was based on religious belief, but then found the limitation to be an unconstitutional establishment of religion.[35] *Id.* at 354-61. Justice Harlan noted the point pressed here by the Secretary—that the unconstitutionality could be cured either by extending objector status to men like Welsh or by nullifying it entirely. *Id.* at 361. Nevertheless, extension was "mandated by the Constitution" because it was the only remedy which could relieve Welsh's injury, i.e., reverse his conviction and prison sentence. *Id.* at 363. Without such a reversal Welsh would be required to "go remediless", an outcome inconsistent with the Court's constitutional duty. *Id.* at 362.

Welsh was, as noted, a criminal case. Nevertheless, the distinction upon which Justice Harlan's opinion turns is just as applicable to injuries suffered by civil plaintiffs. A generation before *Welsh* the Court held, for example, that a party injured by the collection of a discriminatory tax in violation of the equal protection guarantee could not be required to settle for an increase in

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[35]The majority in *Welsh* construed the relevant statute to include Welsh's basis for conscientious objection and accordingly reversed his conviction for refusing induction. 398 U. S. 333, 335-44 (1970).

the tax liability of those favored by the discrimination, though such an increase would cure the unconstitutionality of the tax. Only "a refund of the excess of taxes exacted" would remedy the injury. *Iowa-Des Moines National Bank v. Bennett*, 284 U. S. 239, 247 (1931). More recently, the Court unanimously agreed in *Orr v. Orr*, 440 U.S. 268 (1979) that in order to secure a remedy, and thus to satisfy the injury-in-fact element of article III standing, a party claiming that a statute unconstitutionally withholds a particular benefit (or imposes a particular burden) must at least have a possibility of securing the benefit (or escaping the burden) if the claim is successful. *Id.* at 272-73, 290-98.

These decisions establish that the injury inflicted by an unconstitutionally underinclusive classification is not the abstract wrong of unequal treatment, but the concrete denial of the benefit it authorizes. They further make clear that nullification of that benefit affords no remedy to those excluded from its enjoyment.[37] Applied to the present case, these propositions show that appellees' right to relief from injuries inflicted by the underinclusiveness of the exception clause is violated if the clause is given its purported effect. The inverse severability clause is, for this reason, unconstitutional and cannot be enforced.[38]

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[37]Even if denial of spousal benefits to women situated similarly to appellees' class can in some sense be described as a remedy, the relevant standard is whether the remedy is constitutionally adequate. *Carlson v. Green*, 446 U. S. 14 (1980). If the only avenue of redress available to a victim of unconstitutional government action is too narrow, burdensome, or risky to operate as a significant deterrent to the commencement of challenging litigation, its very niggardliness violates this standard. *See, e. g., Oestereich v. Selective Service System Local Board No. 11*, 393 U. S. 233, 238 (1968).

[38]The doctrine of sovereign immunity does not defeat the right of appellees' class to an adequate remedy. The class seeks

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B. By purporting to deny an injured litigant standing to sue, the inverse severability clause is an unconstitutional attempt to curtail the jurisdiction of the federal courts.

In order to satisfy "the case or controversy" prerequisite to article III jurisdiction, a litigant must demonstrate that the government action complained of causes a "distinct and palpable injury," *Warth v. Seldin*, 422 U.S. 490, 501 (1975), "that is likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976). *See also, Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978). This requirement means that a party who places a question before a federal court must "stand to profit in some personal interest" from its resolution "else the exercise of judicial power would be gratuitous." *Simon v. Eastern Kentucky Welfare Rights Organization, Supra* at 39. Thus, a litigant who challenges the constitutionality of an underinclusive statutory classification must stand at least a chance of securing the benefit conferred by the classification if the challenge is successful. *Orr v. Orr*, 440 U.S. 268, 272-73 (1979).

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no damages from the United States, but, rather, declaratory and injunctive relief against the enforcement of the exception clause and its accompanying inverse severability clause and those spousal benefits which flow directly from such declaratory and injunctive relief. Sovereign immunity does not bar these remedies. *United States v. Testan*, 424 U. S. 392 (1976); *Weinberger v. Salfi*, 422 U. S. 749, 760-61 (1975). *Larson v. Domestic & Foreign Commerce Corp.*, 337 U. S. 682 (1949). In any event, sovereign immunity may not be invoked where its effect would be to bar persons injured by an unconstitutional action of the federal government from securing any relief whatever from that injury. *United States v. Testan, supra* at 399-407 (1976); *United States v. Lovett*, 328 U. S. 303, 312-16 (1946).

By purporting to nullify the grace period established by the exception clause in the event that it is found unconstitutional, the inverse severability clause makes it clear that persons who lose spousal benefits by virtue of the offset enjoy no possibility of either regaining those benefits or profiting in any other tangible sense from a successful constitutional challenge to the gender-based dependency test re-enacted in the exception clause. In short, the inverse severability clause, if binding on a reviewing court, deprives those hurt by the exception clause of standing to challenge it, and thus strips the Court of jurisdiction to hear their constitutional claim. By foreclosing, in advance of litigation, all forms of relief to those harmed by the statute, Congress has thus purported to immunize an arguably unconstitutional statute from judicial review—not only in the practical sense that no one has a tangible interest in challenging its constitutionality, but also in the theoretical, jurisdictional sense that no one has a right to.

For this reason, the severability clause amounts to an impermissible attempt to curtail the jurisdiction of the federal courts in cases raising a constitutional question. While the "exceptions" clause of article III grants Congress substantial power to define the subject matter jurisdiction of this court and of the lower federal courts, Congress cannot, consistent with the constitutional plan, exercise this power in ways that prevent the vindication of constitutional rights. *Cf. Johnson v. Robison*, 415 U.S. 361, 363 (1974). *See also*, Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts*, 66 Harv. L. Rev. 1362, 1365; Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 Yale L. J. 498 (1974), *Ex Parte McCardle*, 74 U.S. (7

Wall.) 506, 515 (1869); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). *But see also, Sheldon v. Sill*, 49 U.S. (8 How.) 440 (1850); *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323 (1938).[39]

Moreover, even if the withdrawal of standing to sue purportedly effected by the inverse severability clause is not viewed as a formal limitation of jurisdiction, but simply as an attempt to render extension of the grace period a nonjusticiable remedy, it still cannot survive constitutional scrutiny. When congressionally imposed restrictions on justiciability purport to prevent courts from enforcing constitutional limitations, they cannot, consistent with the institution of judicial review, be honored. [40] *United States v. Lovett*, 328 U.S. 303, 314 (1946).

By focusing on the impact of the inverse severability clause on the competency of the federal courts, appellees do not mean to suggest that the Constitution requires

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[39]Even if it is permissible for Congress to curtail the jurisdiction of the federal courts to decide constitutional claims, the withdrawal of standing effected by the inverse severability clause also purports to preclude review by state courts. Because the power of state courts to grant relief against federal officials remains uncertain, *see Tarble's Case*, 80 U. S. (13 Wall.) 397 (1872), this added restriction may have little independent effect in this case. Nevertheless, the thrust of the inverse severability clause is to destroy the competence of all courts to remedy violations of constitutional rights.

[40]The Secretary argues that the inverse severability clause does not deprive appellees' class of standing to sue because it is "not an inexorable command" and because it may not "apply in the particular circumstances of a given case." (Appellant's Brief at 47, 48) The Secretary does not explain, however, how the clause can fail to be an "inexorable command" but at the same time be a "considered policy choice" of Congress, binding on the district court in this case. (Appellant's Brief at 50). Nor does the Secretary explain why the inverse severability clause might not be applied to persons falling within its terms, unless it is, as appellees maintain, unconstitutional. The Secretary's attempt to avoid the jurisdictional implications of the clause is thus unpersuasive.

that someone, somewhere, be afforded standing to challenge every instance of its violation, else that violation goes unreviewed. *United States v. Richardson*, 418 U.S. 166 (1974). Nor do appellees claim that all violations of the personal rights guaranteed by the Bill of Rights must be susceptible of judicial correction. *Valley Forge, College v. Americans United for Separation of Church & State*, 454 U.S. 464, 489 (1982). Appellees' argument is, rather, that when such violations cause particular persons tangible harm, here the loss of social security spousal benefits, an attempt by Congress to preclude the award of a remedy for that harm, and thus to deny the persons injured standing to sue, ought to be viewed as an impermissible exercise of the "exceptions" power of article III because it frustrates the vindication of constitutional rights.

C. Invalidation of the inverse severability clause does not intrude on the power of Congress to direct specific remedies for constitutional violations.

Invalidation of the inverse severability clause does not affect Congress' ultimate power to specify the appropriate remedy for the unconstitutional underinclusiveness of the exception clause. Should this Court affirm the judgment of the district court, Congress obviously retains the power to respond by abolishing the exception clause entirely. Such a prospective repeal of the exception clause would effectively override judicial extension of benefits to the appellees without either denying their class a remedy for the period the exception was in effect or undermining their standing to challenge the constitutionality of the exception clause. The Secretary's charge that the district court "has improperly intruded upon the powers of a co-equal branch of government" is thus misplaced. (Appellant's Brief at 50)

Congress also remains free to prescribe remedies in advance of litigation challenging the constitutionality of an underinclusive classification, so long as the remedies prescribed do not undercut the right of persons harmed by the classification to some form of constitutionally adequate relief.[41] The only remedial course foreclosed to Congress is the one chosen in this case: an attempt to preclude, in advance of litigation, the award of any remedy at all to the only class harmed by the underinclusiveness.[42]

This narrow limitation on congressional discretion poses no threat to the deliberate exercise of legislative remedial prerogatives. Presumably, the 95th Congress

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[41]Thus, Congress was not inevitably required to provide for the extension of the exception clause in the event its gender-based dependency test was held unconstitutional. Congress conceivably could have, instead, authorized a damages remedy to compensate excluded men for harms suffered as a consequence of the loss of expected spousal benefits. Alternatively, Congress might have ordered restitution of a portion of the Social Security taxes paid by or on behalf of their spouses. The validity of either of these options is, of course, wholly hypothetical, but the standard by which they would be measured—the responsibility of the legislature to provide an adequate remedy for unconstitutionally inflicted wrongs—is not. *Carlson v. Green*, 446 U. S. 14 (1980), *Bush v. Lucas*, — U. S. —, 103 S. Ct. 2404 (1983).

[42]The use of an inverse severability clause like the present one, in conjunction with an underinclusive classification which adversely affects two classes of persons with interests directly opposed to one another, does not present the constitutional problems at issue in this case, where the underinclusiveness of the exception clause harms only one class, that represented by appellee Mathews. *See e. g., Orr v. Orr*, 440 U. S. 268 (1979). For when an underinclusive classification is susceptible of challenge by two opposed classes, the effect of a clause which prescribes either extension of the benefit or nullification of the burden it allocates is simply to delineate which of the two opposed classes is to be viewed as injured by the underinclusiveness and thus entitled to a remedy in the event it is found unconstitutional. *Id.* at 290-98 (Rehnquist, J., dissenting).

which enacted the pension offset provision, its exception clause, and accompanying inverse severability clause was aware that the effect of the clause would be to stifle incentive to challenge the gender-based dependency test enacted in the exception clause. The 95th Congress can also fairly be charged with the knowledge that this disincentive would work to assure that the harsh remedial choice envisioned by the severability clause would never have to be invoked. In fact, the clause has not been invoked by any reviewing court and no spousal benefits have been suspended or terminated pursuant to its command. Under these circumstances, the inverse severability clause can hardly, despite its facial clarity, be considered a reliable indication of Congress' remedial intention in the event the exception clause is declared unconstitutional. It might, instead, be more accurately viewed as a legislative "bluff" not necessarily indicative of the remedial wishes of a Congress actually faced with judicial invalidation of the exception clause. Effective exercise of judicial review requires that the bluff be called.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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